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May 16, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Re: Implementation of the Local Competition Provisions in  
the Telecommunications Act of 1996, Docket 96-98

Dear Sir:

Enclosed for filing on behalf of NEXTLINK Communications, L.L.C. are comments in response to the Commission's Notice of Proposed Rulemaking released April 19, 1996. An original and 16 copies are included for distribution to the Commissioners.

A copy of this letter and the comments in hard copy and on 3.5" WordPerfect 5.1 diskette have been delivered by hand today to Janice Myles. A copy of the comments have also been delivered by hand today to the International Transcription Service.

Please date stamp and return to the messenger the copy of this cover letter.

Sincerely,

*Daniel M. Waggoner*

Daniel M. Waggoner

Counsel for NEXTLINK  
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Enclosures

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: ) Docket No. 96-98  
)  
IMPLEMENTATION OF THE LOCAL )  
COMPETITION PROVISIONS IN THE )  
TELECOMMUNICATIONS ACT OF 1996 )  
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MAY 16 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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## SUMMARY

NEXTLINK is a privately financed provider of competitive local exchange service. As such, NEXTLINK pays close attention to the signals that government and regulators send regarding support for fair and equitable local telephone competition. The passage of the Telecommunications Act of 1996 was one such strong signal, and has helped inspire investor confidence for start-up companies like NEXTLINK.

Now it is the FCC's turn to send a strong signal to potential investors in the emerging world of competitive telecommunications. As has often been said, "the devil is in the details," and never has that euphemism been more true than in relation to the complex task of implementing local telephone competition. The strong policy guidance adopted by Congress must now be moved forward by this Commission through clear and fair implementing rules. These rules, once established, will govern the opportunities and responsibilities in the largest emerging market this country has ever known, the \$100 billion local telephone market monopolized by the incumbent telephone companies for the last century.

The FCC's action here is the key to competitive investment. Through the development of strong national rules governing local network interconnection and the role these interconnection arrangements should play in allowing the Bell Telephone Companies to reenter the long distance business, this Commission can fulfill Congress' goals. Experience has shown it is often

difficult to motivate a monopoly provider to "do the right thing" for competitive development. Even the strongest and most well-intended policies are often stymied through the regulatory and administrative gamesmanship of incumbent providers. And even the most enlightened and progressive managers at traditional telephone companies are likely to struggle with a divided management in a company and marketplace undergoing rapid transition. Only strong FCC interconnection rules tied to long distance entry can provide a natural incentive for incumbent telephone companies to "play fair" and not to "game the process."

The linkage between effective interconnection and the Bell Companies reentry into the long distance business is the incentive provided by Congress. The FCC, therefore, should carefully craft its interconnection and competition rules to only allow for Bell Company reentry into long distance business when the competitive checklist has been met fully and when actual evidence of effective local competition exists. This policy linkage between competitive interconnection and long distance relief is a powerful "carrot and stick" for the Commission. Once it is gone, few powerful incentives will remain to motivate the recalcitrant Bell Companies. It is, therefore, a critical time for the FCC to establish strong national rules that take advantage of the motivating power of this natural incentive.

In developing its rules, the Commission should learn from the valuable progress made in advancing local competition in a number of states. Drawing on these state experiences, the

Commission can fashion a nationwide model. By adopting the "best practices" of procompetitive states, the FCC will benefit from valuable market place experience in developing the national rules.

NEXTLINK also believes that the Commission should adopt minimum standards for interconnection. These minimum standards should apply in cases where negotiation and mediation fail, or as a default option for carriers selecting it. It also will serve to establish a firm national foundation of reasonable terms for interconnection that can be applied by this Commission, the states and the courts. The Commission also should implement an expedited complaint process under Section 208 to enforce its rules or arbitrated and negotiated agreements.

NEXTLINK urges the FCC to develop clear and strong national rules for the emerging competitive local telephone marketplace. Strong, enforceable rules, combined with the unique natural incentives facing the incumbent telephone companies, will continue to inspire investor confidence for the construction of a competitive telecommunications and information network.

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## I. INTRODUCTION

NEXTLINK Communications, L.L.C. ("NEXTLINK") files these comments in response to the Commission's Notice of Proposed Rulemaking released April 19, 1996. NEXTLINK is a facilities-based competitive local carrier that competes with incumbent local carriers in a number of localities around the country. Based on its experiences with the difficulties and delays of seeking to interconnect with incumbent carriers, NEXTLINK urges the Commission to establish strong nationwide rules for competitive entry based upon the Act. In order to ensure the certainty in regulation that will provide an environment for private investment like NEXTLINK's, the Commission should establish substantive policies and detailed procedures that will be practical and speedy and minimize the opportunity for dispute and delay.

### ***The FCC Should Adopt Detailed, National Rules.***

As an initial proposition, NEXTLINK believes it is vital that the FCC adopt explicit and detailed rules with nationwide applicability to fill out the statutory framework of the Act. Because it is a carrier operating in multiple localities and states, NEXTLINK is well positioned to appreciate the importance of Commission action in this regard. Without it, NEXTLINK will be left to the vagaries of multiple and inconsistent interpretations of the Act with a concomitant drain on resources and opportunities for mischief and delay.



***The FCC Should Adopt the "Best Practices" of Procompetitive States.***

NEXTLINK, however, does not suggest that the substantial experience of a number of states that have already begun to address the issues of competitive local entry should be cast aside. Indeed, NEXTLINK urges this Commission to look to the rulings of states such as New York, California and Washington that have grappled with many of the issues before this Commission over the past years. Drawing on those state experiences, this Commission can fashion a nationwide model. Other states and decisionmakers then can build upon the foundation established by this Commission as they arbitrate disputes and fulfill other roles under the Act.

***The FCC Should Promulgate Minimum Standards for Interconnection as a Default Option.***

NEXTLINK believes that many of the issues raised by the Commission's NPRM can be addressed through a single concept -- adoption of a default option or preferred outcome on which new entrants can rely absent explicit agreement otherwise. Thus, nationwide standards for matters such as technical and other terms and conditions, points of interconnection, and collocation, unbundled or resold network elements and services, unquestionably should be established by the Commission. In the same vein, NEXTLINK strongly supports action by the Commission to establish national proxies for costs and prices. Furthermore, pricing standards should reflect long-run incremental costs both in level

and structure and should include an imputation rule to prevent anticompetitive price squeezes. NEXTLINK submits that bill and keep is the appropriate mechanism for reciprocal compensation until new entrants have the opportunity to overcome anticompetitive obstacles that stand in the way of achieving approximate traffic balance.

On the closely related matter of resale, NEXTLINK's experiences to date suggest that strong Commission action is required. Already, incumbent LECs have sought to use ploys such as "grandfathering" of existing customers and ending tariffs for others to avoid resale obligations. At the same time, incumbent LECs have taken a narrow view of what qualifies as "avoidable costs" in the establishment of wholesale rates. Without Commission direction on these issues, the promise of resale as a transitional vehicle to facilities-based competition will not be realized.

***The Commission Should Establish an Expedited Complaint Process for Introducing Its Rules.***

Finally, NEXTLINK urges the Commission to be especially attentive to procedures for insuring implementation of all Commission policies as well as the policies themselves. Thus, the Commission should make easily available its complaint procedures, as well as arbitration by the Commission where states fail to act, to enforce the rules it establishes. Coupling nationwide standards with effective FCC enforcement will help

ensure that the Act's promise of competition and consumer choice is not an empty one.

## **II. RESPONSES OF NEXTLINK TO NPRM**

### **A. NEXTLINK Is a Competitive Local Carrier for Whom Interconnection Is an Essential Element of Providing Local Service.**

NEXTLINK was founded in 1994 by Craig McCaw, its Chief Executive Officer and principal equity owner, to be a provider of local facilities-based telecommunications services. NEXTLINK's goal is to become an early competitor to the incumbent LEC in each of the metropolitan areas served by NEXTLINK. NEXTLINK intends to achieve this goal by initially targeting small and medium-sized customers in metropolitan areas that have not yet been reached by other competitive local carriers, i.e., Spokane, Washington, Nashville, Tennessee, and Harrisburg, Pennsylvania.

At the company's inception, Mr. McCaw provided initial equity capital, but NEXTLINK recently raised additional funds in the private markets. NEXTLINK currently has operations in ten metropolitan areas in seven states and is in the process of exploring other opportunities. In 1996 NEXTLINK intends to begin providing switched local, long distance and enhanced services in six localities and to provide those services in other areas by early 1997.

From NEXTLINK's perspective, the Telecommunications Act of 1996 (the "Act") was the critical first step in achieving fundamental change in the competitive structure of the local

exchange market and providing private investors the incentives and opportunities to participate in the development of competition. Yet, the Act alone is insufficient to provide the detailed and explicit direction that is necessary for NEXTLINK and others to continue to invest private resources. Congress itself, of course, recognized this fact through its direction to the Commission to implement the Act through rulemaking. And NEXTLINK's own experiences in seeking entry to local markets both before and since passage of the Act demonstrate the importance of the Commission's actions here.

Several examples are illustrative. For close to one year in one state, NEXTLINK has been seeking interconnection and the bare minimum of basic network elements necessary to provide local service. Before passage of the Act, NEXTLINK was unable to reach an agreement even on these simple issues. Even with passage of the Act, however, and in order to begin service quickly, NEXTLINK has been forced to accept "interim arrangements" that fall far short of the Act's standards.

In a different state NEXTLINK was faced with a comparable "take-it-or-leave-it" approach. Again faced with the need to commence local service quickly, NEXTLINK had no choice but to accept the incumbent LEC proposal. Perhaps other carriers with far greater resources and less need to reach the market could have held out for better arrangements, but NEXTLINK, without this

Commission's assistance in the form of rules or procedures, had no choice but to comply.

In the area of resale, NEXTLINK has seen, too, that the Act alone is not enough. In one state NEXTLINK is heavily dependent upon resale of an incumbent LEC offering. Faced with the Act's requirements of allowing resale at a wholesale discount, the incumbent LEC has sought to withdraw the tariff NEXTLINK was reselling and block the addition of new locations or customers by NEXTLINK. In a different state and in different circumstances, NEXTLINK has been forced to accept a paltry resale discount because this Commission has not yet established explicit or detailed standards for avoidable costs.

Finally, NEXTLINK has experienced the regulatory burdens that can result when a state commission does not properly distinguish between the degree of regulation appropriate for new entrants versus incumbent LECs. Forced to deal with the regulatory panoply of reporting, accounting and other requirements, NEXTLINK's resources are not fully devoted to building facilities or finding customers. Instead, they are consumed with unnecessary compliance with rules designed for incumbent carriers with monopoly power.

NEXTLINK offers these examples because it is important for this Commission to understand the critical nature of the task it has undertaken. Without the certainty and explicit mandates on a nationwide basis that only this Commission can provide, companies

such as NEXTLINK will not be able to enter or thrive in local markets.

**B. The FCC's Rules Must Be Based on a Recognition of the Realities of the Marketplace.**

NEXTLINK fully appreciates the tremendous task the Commission has before it as well as the critical nature of many of the detailed questions the Commission must answer. At the same time, however, it is vital that the industry not lose sight of the forest while focusing on the trees, and that all aspects of this rulemaking be subject to Congress' overriding goal of replacing regulation with competition, as quickly and efficiently as possible.

NEXTLINK submits that this goal can be satisfied only by rules that are based upon a recognition of current marketplace conditions, the practicalities of negotiations and dispute resolution, and the enormous demands on the limited resources of new entrants such as NEXTLINK. Otherwise, new entrants will be forced to engage in the Sisyphean task of addressing each essential condition for competition in separate proceedings in multiple states. Any procompetitive set of policies and procedures thus must satisfy at least the following tests:

1. They must be clear and practical so that the negotiations or the regulatory process cannot be used as a barrier to entry;

2. They must provide for speedy resolution of disputes so that delay does not thwart Congress' procompetitive goals;

3. They must recognize the enormous disparity in bargaining power between carriers such as NEXTLINK and the incumbent LECs; and

4. They must be based on a recognition that each step on the road to competitive entry can become a roadblock in itself if it is not addressed in advance by this Commission.

NEXTLINK believes that the kind of procedural approach adopted by the California and New York Commissions to govern interconnection negotiations passes these tests. In a December 1995 decision, the California Commission promulgated "preferred outcomes" for many interconnection issues in a level of detail sufficient to guide carrier-to-carrier negotiations. Competition for Local Exchange Service, Decision 95-12-056 (Cal. Pub. Util. Comm'n, Dec. 20, 1995) ("Cal. Competition Order"), Appendix A. Within those boundaries, carriers have been able to come to agreement more quickly on several of the initial steps towards interconnection. And where carriers are unable to reach agreement, the California Commission is available to step in through mediation, an expedited complaint procedure or otherwise.

In New York, the Commission adopted a default option which may be chosen by new entrants if agreement cannot be reached. Order Instituting Framework for Carrier Interconnection,

Case 94-C-009 (N.Y. Pub. Serv. Comm'n, Sept. 27, 1995). Again, this approach speeds competitive entry, but allows refinement or evolution of interconnection arrangements through negotiations.

Adoption of a complete and detailed blueprint of national interconnection standards would be an appropriate foundation for competition under the Act. Carriers, of course, would be free to vary from the preferred or default solution by agreement, but those carriers wishing to do so could simply opt for the national standard as to many issues.<sup>1</sup> Given the limited resources of this Commission and many new competitors, such an option would have tremendous advantages in encouraging uniformity, efficiency and speedy entry.

**C. Jurisdictional Issues Concerning Section 251.**

**1. The FCC Must Adopt Detailed Rules With Nationwide Application for the Development of Fair and Efficient Competition.**

The preliminary question posed by the NPRM is the extent to which the Commission's rules should further define the statutory duties established by Section 251. As a carrier that already operates in a number of states, some with more procompetitive policies than others, NEXTLINK believes the only possible answer to this inquiry is in the affirmative. As the Commission itself recognizes, NPRM ¶ 27, any other approach would burden the private sector by allowing a patchwork of inconsistent and

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<sup>1</sup> This approach is in accord with Congress' concept that Section 251 of the Act provides "minimum standards" for interconnection. See Joint Explanatory Statement, p. 5.



unpredictable state approaches. Creation of a national procompetitive policy to replace such a crazy quilt is precisely the reason that Congress took action by passing a national Act. See, e.g., 141 Cong. Rec. S. 7881-2, S. 7886 (June 7, 1995), Statement of Sen. Pressler; 142 Cong. Rec. H. 1149 (February 1, 1996), Statement of Rep. Fields. Furthermore, a nationwide framework for competition will encourage the development of lower cost technologies and interconnection arrangements by ensuring uniformity across the country.

At a minimum, therefore, the Commission should address in detail each of the critical obligations imposed by § 251. Congress itself recognized the essentiality of each of those major elements of interconnection and NEXTLINK's experience in the marketplace to date demonstrates that each one is an important step on the critical path to competitive entry.

- Take the duty to interconnect, for instance. Without the ability to collocate or have access to rights-of-way, conduit or other facilities, a potential competitor cannot reach the incumbent for exchange of traffic.
- To the same degree, joining together of competitive networks may have little value if a new competitor with limited facilities of its own cannot obtain access to incumbent unbundled facilities or take advantage of the opportunity to resell incumbent services.

- At the same time, NEXTLINK has learned through marketplace research that number portability and dialing parity are equally essential to the ultimate success of local competition because of the desire of customers to retain current phone numbers that are associated with their business or identity.

When developing its rules, therefore, the Commission not only must establish a nationwide foundation upon which all carriers can rely; it also must provide sufficient detail on each of the major statutory obligations to give them force in negotiations, arbitrations or subsequent enforcement actions.

## **2. A Number of State Actions Can Serve as Bases for a National Model.**

As this Commission properly notes, a number of states already have taken major steps to open local markets to competition in ways that comport with the Act. NEXTLINK thus urges the Commission to draw from those states the best features of their rulings and include them in the Commission's national model. In this way the Commission can take advantage of the states as laboratories and bring other states into compliance with minimum standards that have been proven in the marketplace.

NEXTLINK commends in particular the decisions of a number of states in which it operates or is licensed to provide service. In Washington State the Washington Utilities & Transportation Commission (in a decision noted in the NPRM, n.81, ("Washington Order")) addressed many of the cost and rate issues related to

interconnection and expressly rejected any kind of usage-sensitive fee for reciprocal compensation. Instead, the Washington Commission ordered bill and keep on an interim basis and expressly required the industry to develop "flat-rated" charges, if any are imposed, for interconnection in the future. Id.

The decisions of the California Commission on interconnection also provide a useful starting point on both substantive and procedural issues. Like the Washington Commission, the California Commission adopted bill and keep as an interim solution until traffic flows and costs can be accurately measured. Decision 95-07-054 (Cal. Pub. Util. Comm'n, July 24, 1995) ("Cal. Bill and Keep Order"). By doing so, the California Commission provided new entrants an opportunity to begin operations with certainty in financial arrangements and without unnecessary burdens of recording, billing or administrative complications and dispute. See also In the Matter of the Application of Electric Lightwave, Inc. (Pub. Util. Comm'n. of Ore., Jan. 1, 1996) ("Oregon Order") (adopting "bill and keep" on an interim basis).

The California Commission also adopted two valuable procedural mechanisms that have served to encourage and guide negotiations in that State. First, the California Commission adopted a list of "preferred outcomes," which, as NEXTLINK pointed out above, has helped equalize the bargaining power

between new entrants and incumbents by setting minimum standards that must be met. Cal. Competition Order, Appendix A. Second, the California Commission established an expedited mediation and dispute resolution procedure in recognition of the harm that can result from the mere existence of delay. Id. at 36-39. These procedural devices deserve particular attention from this Commission and consideration for adoption on a national basis.

**3. The Commission's Rules Should Apply Broadly to Both Arbitrated Agreements and BOC Statements and Interstate and Intrastate Jurisdictions; They Should Be Enforced Through the Complaint Power of the Commission.**

The NPRM also requests comments on several other jurisdictional issues regarding the scope of the Commission's rules under §§ 251 and 252. As noted above, NEXTLINK believes that the Commission should apply its rules as broadly as possible to equalize bargaining power and provide for the most rapid and efficient development of competition. This is consistent with Congress' intent to establish a uniform, national and procompetitive policy and also serves the interests of all members of the industry in ensuring consistent treatment in varying circumstances. For these reasons and because the Act itself provides for no separate standards, the Commission should subject arbitrated agreements and BOC statements to the same set

of duties and standards.<sup>2</sup> Both arbitrated agreements and BOC statements are intended to address the same issues and elements, and should be reviewed consistently in order to ensure greater uniformity and ease of state commission administration.

NEXTLINK also strongly supports the Commission's tentative conclusion to apply the same rules to interstate and intrastate jurisdictions. This is the only possible interpretation that satisfies both the language and purpose of the Act. First, the essence of §§ 251 and 252 is the creation of entry into local markets. By their very nature, local markets are predominantly intrastate under traditional concepts of telecommunications jurisdiction; the very purpose of Congress in passing §§ 251 and 252 would be eviscerated if the Commission did not apply its rules to the intrastate jurisdiction.

Second, the policies of nationwide, open and robust competition underlying the Act would be thwarted if the FCC's rule were not applied to the intrastate jurisdiction. Without application of the same standards both to interstate and intrastate calling, there will be no national policy at all.

With regard to the Commission's related inquiry on its continuing authority under § 208, NPRM ¶ 41, NEXTLINK believes that the Commission's complaint authority should be applied to

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<sup>2</sup> It is also appropriate because state commissions are granted authority under Section 252(g) to consolidate proceedings in order to promote efficiency. It would be absurd for a state agency to consider arbitrated agreements and BOC statements under different standards in the same proceeding.

address violations of the Commission's rules, the Act and negotiated or arbitrated agreements. Nothing in the Act removes the Commission's authority in this regard and the Commission's intervention will be critical both before and after conclusion of state arbitrations. Indeed, application of the complaint authority will be especially important after the Commission addresses Section 271 petitions when the BOCs may lose much of their incentive to avoid harm to competitors.

**D. Substantive Duties Under Section 251(c).**

**1. The Commission Should Apply the  
Section 251(c) Duties Only to Incumbent LECs.**

The Commission's preliminary inquiry with regard to § 251(c) is whether all local carriers, including new entrants, should be subject to the same obligations. NEXTLINK urges the Commission to reject this notion and follow the statutory framework and sensible public policy to clearly distinguish between new entrants and incumbent local exchange carriers.

First, the structure of the Act expressly distinguishes incumbent local exchange carriers with market power from those new entrants without market power that must comply only with the common carrier duties listed in §§ 251(a) and (b). Congress clearly stated its purpose of focusing on actual market power in establishing these separate schemes, Joint Explanatory Statement, p. 5, and this Commission's own experience with dominant and nondominant regulation is helpful by analogy. Second, to allow state commissions to impose the duties of an incumbent on a new

entrant such as NEXTLINK could serve as a barrier to entry under § 253<sup>3</sup> and, at a minimum, could unnecessarily delay and hinder entry. Indeed, to read the Act otherwise would turn § 251(h)(2) into a nullity. If incumbents and new entrants were automatically to be treated the same, there would be no reason for a provision which allows the Commission to treat other carriers like incumbent LECs if market conditions change.

**2. The Commission Should Establish National Standards for Good Faith Negotiations.**

NEXTLINK's experience to date is that the greatest barrier to good faith negotiations is the incumbent LEC's ability to deny interconnection absent a new entrant's willingness to sign an unreasonable agreement. As a response to this ploy, NEXTLINK urges the Commission to establish a detailed default option for interconnection that will be available to new entrants confronted with an incumbent taking such a position. NEXTLINK also suggests that the Commission expressly find that an incumbent's "take-it-or-leave-it" approach to negotiation is an act of bad faith. A mere finding that such a negotiating posture is an act of bad faith, however, will only encourage litigation unless the clear alternative of a default option is available for the new entrant.

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<sup>3</sup> Some forms of regulation are sufficiently intrusive and burdensome to serve as effective barriers to entry. For instance, requiring a new entrant to serve an area it cannot feasibly reach or to comply with excessive accounting and financial reporting rules that are infeasible for a company could thwart entry into a particular state.

On a separate matter, the Commission should mandate the disclosure of technical and cost information by incumbent LECs during negotiations. NEXTLINK's experience in negotiations is that incumbent LECs resist providing exactly the information on costs and network elements that is critical to discussion of the issues under Section 251(c). This Commission can greatly assist parties in negotiations by providing that the incumbent LEC's duty to negotiate includes providing access to such information.

**3. The Commission Should Establish Nationwide Standards on Technical Conditions of Interconnection.**

NEXTLINK strongly supports uniform national rules that specify technical standards to the greatest extent possible. As the Commission notes, and as NEXTLINK has previously experienced, lack of specificity simply provides an opportunity for delay or leads to an increase in operating expenses. By contrast, more specific technical rules, i.e., such as those that specify minimum points and types of interconnection, will guarantee rapid and efficient entry across the states.

Nor would national standards necessarily foreclose experimentation or adjustments of technical or operational standards. Any standards should be subject to exceptions if both parties to an agreement seek a different approach or if existing networks make infeasible a specific kind of interconnection. On the other hand, NEXTLINK urges the Commission to carefully evaluate the suggestions of any party claiming uniformity is not



possible. NEXTLINK's experience in a variety of states across several regions of the country is that network equipment and deployment is highly standardized on a nationwide basis and that all carriers seek and benefit from such standardization.

As to the specifics of defining technically feasible points and types of interconnection, NEXTLINK suggests use of two sources of information. First, the Commission is well aware of the existence of industry-wide, standard-setting bodies, i.e., Bellcore. NEXTLINK urges the Commission to find that any point of interconnection defined in national standards should be deemed feasible. Second, NEXTLINK agrees with the Commission's focus on the technical points of interconnection already employed by the incumbent LECs. Existing interconnection arrangements between incumbents and their affiliates and other carriers or between incumbents and retail customers should be mandatory for use in interconnection with competitive carriers.

**4. The Commission Should Ensure Reasonable and Nondiscriminatory Interconnection That Is Equal in Quality.**

As the Commission requests, NEXTLINK separately addresses pricing standards for interconnection, collocation and unbundled elements. On other aspects of interconnection, the Commission also should establish broad rules to avoid discrimination against new entrants.

For instance, the Commission should mandate that the quality of installation, maintenance or repair provided to retail